ownership and is protected by the Takings Clause of the Fifth Amendment. However, abrogation of that right through mandated nondiscriminatory physical access once the property owner has initially consented is not always a violation of the Takings Clause. An analysis of *Heart of Atlanta Motel*,[123] and the cases applying that decision clearly articulate an exception for nondiscriminatory access requirements to the general takings analysis.

Heart of Atlanta Motel challenged the public accommodations section of the Civil Rights Act of 1964, which mandated that restaurants operating in interstate commerce could not discriminate on the basis of race. Among the several arguments made by the challenger, was claimed that the Civil Rights Act was an unconstitutional taking without just compensation. The Court's summary dismissal of that argument relied on three cases: the *Legal Tender Cases*,[124] *Omnia Commercial Co. v. United States*,[125] and *United States v. Central Eureka Mining Co.*[126]

Supreme Court interpretations subsequent to *Heart of Atlanta Motel* establish a distinct analysis when nondiscrimination requirements are considered. If a property owner has voluntarily given access to the property to any user, the Federal Government can properly regulate the characteristics of that access even to the point of requiring that all potential users be given access. If, in that manner, a nondiscrimination requirement has been brought into question, the Federal Government action will be declared a taking only if it rises to the level of a regulatory taking upon application of the *Penn Central* analysis, discussed in detail below.

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123 Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

124 12 Wall. 457 (1870).

125 261 U.S. 502 (1923).

126 357 U.S. 155 (1958).

The Supreme Court affirmed this volitional analysis for physical occupation in *Yee v. City of Escondido*. In that case, a combination of rent control and the Mobile Home Residency Law amounted to a physical occupation of property.[127] However, the Court found that this did not effect a taking because the property owners had voluntarily rented their property to mobile home owners and could choose to refuse access to all mobile home owners to avoid the occupation.[128] "Because they voluntarily open their property to occupation by others, petitioners cannot assert a per se right to compensation based upon their inability to exclude particular individuals."[129]

The *Yee* Court limited *Loretto*'s analysis to situations in which allowance of the initial physical invasion is found. That is, in *Loretto*, the statute allowed as an initial "invasion" access by a cable operator even *where no cable operator had facilities in the building* (*i.e.*, the statute required that the property owner permit cable operator entry in the first place). By contrast, in *Yee*, the regulation at issue did not provide for the initial invasion. Similarly, the Supreme Court concluded that the Pole Attachment Act of 1978 -- prior to the 1996 amendments -- did not effect a taking because there was no "required acquiescence."[130] That is, the Act simply gave the

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127 The Mobile Home Residency Law limited the bases for which a property owner could evict a tenant, preventing the owner from removing the home after a sale or from disapproving of the purchaser. In addition, various rent control ordinances prohibited rate increases without approval. Petitioners contended that this combination required the property owner to submit to a physical occupation of the land. See Yee v. City of Escondido, 503 U.S. 519, 524-26 (1992).

128 Id. at 529 ("When a landowner decides to rent his land to tenants, the government may . . . require the landowner to accept tenants he does not like without automatically having to pay compensation.").

129 Id. at 531 (citing Heart of Atlanta Motel, 379 U.S. at 261).

130 Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245, 252 (1987) (limiting *Loretto* to find a permanent physical occupation only where the element of

Commission authority to regulate rates; it did not force pole owners to enter into contracts where there were none. Where, as in *Yee* and *Florida Power*, the landlord has already permitted one telecommunications carrier into the building -- a *per se* analysis is inappropriate and the MTE owner cannot be said to be forced into forfeiting the right to rent property in order to avoid a compelled initial physical occupation.[131]

Later cases further enunciated the takings analysis for nondiscriminatory access requirements.[132] For example, *Thomas v. Anchorage Equal Rights Commission*[133] determined the proper application of the *Yee* volitional analysis to nondiscriminatory access requirements. *Thomas* noted the Supreme Court's conclusion in *Yee* that landowners do not possess a *per se* Takings Clause right to choose their incoming tenants.[134] Therefore, instead of the *per se* analysis, the *Thomas* court applied the three-part regulatory takings analysis first outlined in *Penn Central Transportation Co. v. New York City*.[135] The *Penn Central* factors are (1) the character

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"required acquiescence" is present: "This element of required acquiescence is at the heart of the concept of occupation.").

131 Indeed, the effect is identical to a Commission-imposed prohibition on telecommunications carriers from serving MTEs to which nondiscriminatory access is not permitted.

132 The Yee test has been applied to access requirements on both the federal and state level. For example, Rent Stabilization Association of New York City, Inc. v. Higgins, 630 N.E.2d 626 (1993), found that housing regulations expanding the class of family members who could not be evicted following the death or departure of the tenant of record were not a per se taking because the landlord had opened his property up to tenancy and therefore did not have "unfettered discretion in rejecting tenants." Id. at 633.

133 Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999). Thomas involved a challenge to Alaska regulations mandating that property owners could not discriminate against unmarried tenants.

134 See id. at 708.

135 438 U.S. 104 (1978).

of the government action, (2) its economic impact on the claimant, and (3) its interference with reasonable investment-backed expectations.[136] The fact that a nondiscriminatory access requirement imposes a physical occupation on the property will cause the first factor, the character of the government action, to weigh more heavily. However, physical occupation alone will not cause the requirement to effect a taking.[137]

Nondiscriminatory access requirements are merely regulation of voluntary acquiescence to occupation by others, not a physical invasion of property requiring compensation under the Fifth Amendment. Because "the government has considerable latitude in regulating property rights in ways that may adversely affect the owners,"[138] it is perfectly within the powers of the government to modify these agreements to allow for nondiscriminatory access without affecting a taking.

Likewise, MTE owners subject to a nondiscriminatory MTE access requirement retain a choice to restrict the access of any and all telecommunications carriers. They are not compelled to permit access to anyone in the first instance. However, as in *Yee*, once they have "open[ed] their property to occupation by others" -- for example, the ILEC -- the government retains a legitimate regulatory interest in that relationship and MTE owners cannot assert a physical invasion takings claim.

Because nondiscriminatory MTE access, by definition, addresses situations in which one carrier already has been granted access to an MTE, cases involving subsequent entry (such as *Yee* and *Florida Power*) are more closely analogous to a nondiscriminatory MTE access requirement

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136 See id. at 124.

137 See Thomas, 165 F.3d at 709.

138 Hodel v. Irving, 481 U.S. 704, 713 (1987).

than cases which address mandated initial "invasions" (such as *Loretto*). Nondiscriminatory MTE access, properly implemented, would merely regulate the practice of allowing access rather than mandating the same. As such, the Takings Clause does not operate as a barrier to a nondiscriminatory MTE access requirement. A nondiscriminatory MTE access requirement does not compel MTE owner participation in the first instance[139] and, therefore, must not be analyzed under the *per se* analysis of *Loretto*.

The regulatory takings analysis of *Penn Central* reveals that a nondiscriminatory MTE access requirement does not implicate the Fifth Amendment's takings clause. Under the first prong, the character of the Commission's action is, by definition, in the public interest. It seeks not only to secure access to telecommunications competition for a substantial portion of the U.S. population living and working in MTEs but, as explained above, the effect of such action will extend beyond the multi-tenant environment. With respect to the second prong, the economic impact on the MTE owners will be minimal -- indeed, the MTE owners will receive compensation in exchange for the nondiscriminatory access. They will be indemnified against property damage and the value of their MTEs will be enhanced by the presence of multiple carriers with advanced networks. Finally, the recent nature of telecommunications competition indicates that there are very few investment-backed expectations for telecommunications carrier access fees. Moreover,

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139 The Notice asks whether constitutional problems would be mitigated if a requirement were tailored so that a property owner could satisfy a nondiscrimination requirement simply by allowing transport of a competing carrier's signals over existing wire that the building owner owns and controls. See Notice at ¶ 60. Of course, the absence of any physical occupation by a telecommunications carrier would wholly eliminate any credible takings claim. Nevertheless, almost by definition, such an approach would discriminate against facilities-based carriers (failing to accomplish the Commission's stated objectives in this docket), particularly those that require installation of rooftop antennas. In short, *nondiscriminatory* MTE access would not be achieved by such a tailored requirement.

the fees paid by carriers in exchange for access will be reasonable (particularly as considered in the historic context given the fact that most ILECs currently do not pay anything for access). Consequently, a nondiscriminatory MTE access satisfies the *Penn Central* factors and does not amount to a regulatory taking of private property.

B. The Commission Can Condition Forbearance from Regulation of MTE Owners on a Limited Waiver of MTE Owners' Fifth Amendment Rights.

Even if nondiscriminatory access implicates an MTE owner's private property rights, the MTE owner may waive some of those rights in exchange for the avoidance of regulation by the Commission. The Supreme Court has explained that a Fifth Amendment takings issue is not implicated when the permanent occupation of private property is the result of a condition for regulatory relief which serves a legitimate agency purpose.

In *Nollan*, the Court considered whether a condition on a building permit requiring the permittees to build a public easement on their property in exchange for the permit constituted an unlawful taking. The Court stated that

> [a]lthough . . . a requirement, constituting permanent grant of a continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house . . . must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same ends.[140]

Of course, there must be a nexus between the condition imposed and the original purpose of the regulation from which relief is granted.[141]

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140 Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 (1987).

141 Id. at 837.

In the instant matter, it has been demonstrated that the Commission possesses the authority to regulate MTE owner control over interstate communication transmission facilities (such as intra-MTE wiring) and other facilities to the extent that such control affects interstate wire or radio communication. Short of this, though, the Commission could forbear from fully regulating MTE owners (as well as their access arrangements with incumbent LECs) to the extent that such owners agreed to the condition of permitting CLEC access to MTEs on a reasonable and nondiscriminatory basis.

Since *Nollan*, the Court has further clarified the meaning of its nexus requirement. There must be some "rough proportionality" between the condition imposed and the government's authority.[142] In *Dolan*, the Court held that the local zoning authority was unable to demonstrate a reasonable relationship between its policy objectives and the burden imposed on the applicant's Fifth Amendment rights. The court reversed the city's condition, in part, because the zoning authority was unable to demonstrate why the same public policy objective could not be realized without burdening the applicant's private property rights.[143]

By contrast, the Commission has identified the unique benefits offered to consumers by facilities-based competition and has noted its policy objective of promoting the construction and use of competitive networks.[144] Ensuring that the benefits of the 1996 Act are available to all Americans -- including those working or living in MTEs -- cannot be realized without providing for nondiscriminatory MTE access. Consequently, there is a reasonable relationship between the

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142 Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

143 Id. at 393.

144 Notice at ¶ 27.

Commission's policy objectives and any burden that may be imposed on the Fifth Amendment rights of MTE owners. In exchange for forbearance from regulation as persons engaged in wire and radio communication, the MTE owners may waive any Fifth Amendment rights that might be implicated by nondiscriminatory telecommunications carrier access. Thus, a takings would not be accomplished and, as discussed below, the application of *Bell Atlantic v. FCC* would not be implicated either. In the alternative, the MTE owner refusing to permit nondiscriminatory access would subject itself (and its contracts with incumbent LECs) to the Commission's full regulation (that would be necessary in a discriminatory access environment).

C. If Nondiscriminatory MTE Access Does Constitute a Taking, It May Nevertheless Remain Constitutional and Within the Delegated Authority of the Commission.

Should the Commission decide that a nondiscriminatory MTE access requirement constitutes a taking in spite of the preceding discussion, this does not mean that it is an "unconstitutional" taking. Indeed, the Fifth Amendment expressly provides for takings; takings are a constitutionally-contemplated phenomenon.

In order to survive constitutional scrutiny, however, just compensation must accompany any taking. To the extent that landlords are allowed to collect just compensation in exchange for access, should the MTE access requirement be deemed a taking, it would remain constitutionally sound.

The *Loretto* decision is of significance in this regard. In *Loretto*, a New York statute prohibited landlord interference with the installation of cable television facilities on the landlord's property and prohibited a landlord from demanding payment in excess of the level established by the State Commission on Cable Television. A landlord brought suit, complaining that the statute operated as a taking without just compensation. The sole matter at issue in the Supreme Court

case was whether the New York statute constituted a taking; the *Loretto* Court determined that it did. The Court expressly did not rule on the constitutionality of that taking -- a wholly separate matter -- since an inquiry into just compensation is required for that determination and the Court did not consider the compensation issue.[145] Far from invalidating or otherwise ruling on the constitutionality of the statute in *Loretto*, the Court merely passed upon its status as a taking. Consequently, the *Loretto* case demonstrates that whether a government regulation constitutes a taking and whether it is unconstitutional involves two separate inquiries. Moreover, an affirmative answer to the first inquiry does not correlate to an affirmative answer to the second.

Moreover, if MTE access is deemed a taking, the Commission retains the authority to require that the access be granted. An administrative agency is granted authority to effect a taking either explicitly or implicitly.[146] Takings authority is to be implied where it is "a matter of necessity, where 'the grant [of authority] itself would be defeated unless [takings] power were implied.'"[147]

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145 See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982)("Our holding today is very narrow. . . . [O]ur conclusion that § 828 works a taking of a portion of appellant's property does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken. The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand."). Although there was no subsequent judicial finding on the adequacy of the compensation (partly because landlords did not apply to the Cable Commission for reasonable compensation following the Supreme Court decision), a State court did characterize it as "altogether improbable [that it would be] eventually judicially determined that the very minimal compensation landlords stand to receive under the Executive Law § 828 compensatory scheme (in most cases $1.00) does not amount to just compensation . . . ." Loretto v. Group W Cable, 135 A.D.2d 444, 448, 522 N.Y.S.2d 543, 546 (1987).

146 Bell Atlantic Telephone Cos. v. F.C.C., 24 F.3d 1441, 1446 (D.C. Cir. 1994).

147 Id. (quoting Western Union Tel. Co. v. Pennsylvania R.R., 120 F. 362 (C.C.W.D.Pa.), aff'd, 123 F. 33 (3rd Cir. 1903), aff'd, 195 U.S. 540 (1904)).

The Commission has the authority not only to effect a taking, but also to establish the minimum level of just compensation.[148] "The Fifth Amendment does not require a judicial determination of just compensation in the first instance on each occasion of a taking of private property."[149] Indeed, any concern over the inadequacy of compensation is guarded against by the ability of parties to seek judicial relief under the Tucker Act.[150]

IX. THE BELL ATLANTIC V. FCC DECISION IS NOT APPLICABLE TO THE MTE ACCESS CONTEXT.

Teligent notes that concerns have been raised with respect to precedent established by the *Bell Atlantic v. FCC* decision.[151] A thorough reading of the *Bell Atlantic* decision and related Supreme Court and federal appeals court decisions reveals that the operating doctrine of *Bell*

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148 See Gulf Power Co., 998 F.Supp. at 1397 (citing Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-94 (1985)). In Williamson County, the Supreme Court held that a takings claim was premature as long as the regulatory commission involved had not issued a final order regarding the application of the ordinance in question and because the property owners had not sought compensation through state procedures before turning to the courts. Id.

149 Id. at 1398 (quoting Wisconsin Central Ltd. v. Public Serv. Comm'n, 95 F.3d 1359, 1369 (7th Cir. 1996)).

150 See 28 U.S.C. 1491(a)(1). See Williamson County Regional Planning Comm'n, 473 U.S. at 194-195 (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013, 1018, n.21)("If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking."); see also Presault v. I.C.C., 494 U.S. 1, 12 (1990)(noting that Congress must exhibit an "unambiguous intention to withdraw the Tucker Act remedy . . . to preclude a Tucker Act claim")(citations omitted). Nothing in the Communications Act indicates that Congress has foreclosed a Tucker Act remedy. See Bell Atlantic, 24 F.3d at 1445, n.2.

151 See Notice at ¶¶ 59-60; see also Notice at *Statement of Commissioner Harold Furchtgott-Roth Concurring in Part and Dissenting in Part* and *Separate Statement of Commissioner Michael K. Powell, Concurring.*

Atlantic -- the avoidance canon -- even if properly applied in that case, does not apply in the context of nondiscriminatory MTE access and, consequently, need not limit the Commission's willingness to exercise its authority in that regard. In *Bell Atlantic*, the D.C. Circuit found that the constitutional takings issues presented by the Commission's physical collocation rules overrode the court's customary deference to the agency's interpretation of its own authority.[152] Moreover, given the constitutional concerns that would otherwise have been presented by the physical collocation rules, the court held that Section 201(a) had to be construed narrowly.[153] The D.C. Circuit held that while the statute provided the FCC with the power to order physical connections between carriers, the statute did not supply a "clear warrant to give third parties exclusive license to occupy an ILEC's central office."[154] The *Bell Atlantic* case stands for the proposition that a court should avoid constitutional issues presented by administrative orders by narrowly construing the relevant statute where "there is an identifiable class of cases in which application of the statute [by the administrative order] will necessarily constitute a taking."[155] This avoidance proposition (or "avoidance canon") is inapplicable in the context of nondiscriminatory MTE access for several reasons.

Most importantly, nondiscriminatory MTE access would not effect a taking. It has been suggested that nondiscriminatory MTE access constitutes a taking under the analysis of *Loretto v. Teleprompter*.[156] However, it must be remembered that the *Yee* decision limited *Loretto* to

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152 Bell Atlantic, 24 F.3d at 1445.

153 Id.

154 Id. at 1446.

155 Id. at 1445 (quoting U.S. v. Riverside Bayview Homes, 474 U.S. 121, 128, n.5 (1985))(emphasis added).

156 Loretto, 458 U.S. 419.

instances in which an individual retained no meaningful choice to avoid application of a regulation.[157] Teligent has explained that even under an operative nondiscriminatory MTE access regime, the landlord retains the power to restrict access for all telecommunications carriers equally. Barring a landlord's decision to exclude all telecommunications carriers, nondiscriminatory MTE access requirements would apply to the landlord's access decisions. This neither constitutes an initial physical invasion nor a taking; it merely represents regulation of a landlord's voluntary opening of property to others. Consequently, the avoidance canon is inapplicable because a nondiscriminatory MTE access requirement would not raise constitutional taking issues.

Nevertheless, the facts underlying the *Bell Atlantic* case are distinguishable from the nondiscriminatory MTE access context. In *Bell Atlantic*, the physical collocation rules were mandatory. With two narrow exceptions, ILECs were required to allow physical collocation in all instances. No measure of voluntariness accompanied the rules. By contrast, a nondiscriminatory MTE access requirement retains the option for the MTE owner to exclude all carriers from the MTE equally. In short, the MTE owner can decide whether to submit to the nondiscriminatory MTE access requirement. As a result, the nondiscriminatory MTE access requirement is more akin to a permissible -- rather than a mandatory -- physical collocation requirement.

In addition, nondiscriminatory MTE access would not *necessarily* constitute a taking. The *Bell Atlantic* decision, by its terms, applies only where the rule would "necessarily constitute a taking."[158] Indeed, the Supreme Court found erroneous a Sixth Circuit conclusion that "a

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157 Yee v. City of Escondido, 503 U.S. 519 (1992).

158 Bell Atlantic, 24 F.3d at 1445.

narrow reading of the [agency's] regulatory jurisdiction over wetlands was 'necessary' to avoid 'a serious taking problem.'"[159] The Court explained that "the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred."[160]

Given the reasonable likelihood that nondiscriminatory MTE access requirements would *not* constitute a taking, it would be strained to classify them to "necessarily" constitute a taking. Using the words of the Supreme Court, there is "no identifiable set of instances in which mere application of [a nondiscriminatory MTE access requirement] will necessarily or even probably constitute a taking. The approach of adopting a limiting construction is thus unwarranted."[161]

Alternatively, nondiscriminatory MTE access would effect a taking, if at all, only in certain situations. Very recently, the D.C. Circuit revisited the avoidance canon in *Nat'l Mining Ass'n v. Babbitt*.[162] It concluded that "the avoidance canon is not applicable when the statute or regulation would effect a taking, if at all, only in certain situations."[163] The court went on to explain that it "will not frustrate [] permissible applications of a statute or regulation based on the specter -- rather implausible from what we can tell now -- of a future unconstitutional taking."[164]

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159 U.S. v. Riverside Bayview Homes, 474 U.S. 121, 127 (1985).

160 Id. at 128. The Court noted the availability of compensation claims under the Tucker Act. Id.

161 Id. at n.5.

162 No. 98-5320, 1999 WL 241776 (D.C. Cir. 1999).

163 Id. at *10.

164 Id.

As noted above, it is unlikely that a nondiscriminatory MTE access requirement would even amount to a taking. However, in the unlikely event that it is deemed a taking, a nondiscriminatory MTE access requirement should be accompanied by a reasonable compensation requirement. It is almost certain that compensation would exceed $1 per building and highly unlikely that such a low sum as $1 would be deemed unconstitutional. Reasonable compensation of $1 per building has survived judicial scrutiny for MTE access in the cable television context. A compensable amount greater than $1 is almost certain to qualify for reasonable compensation under a Fifth Amendment analysis (particularly given that telecommunications carrier presence within an MTE actually enhances rather than detracts from an MTE's value). Therefore, the notion that nondiscriminatory MTE access would constitute an unconstitutional taking is rather implausible. The D.C. Circuit's most recent analysis should apply, and the avoidance canon should be deemed inapplicable in the context of nondiscriminatory telecommunications carrier access to MTEs.

Construction of the Communications Act to bar Commission authority to mandate nondiscriminatory MTE access would be plainly contrary to the intent of Congress. In another opinion subsequent to the *Bell Atlantic* decision, the D.C. Circuit explained that a narrow construction to avoid constitutional difficulties is warranted "if such a construction is not plainly contrary to the intent of Congress."[165] A narrow judicial construction of the Communications Act to preclude Commission nondiscriminatory MTE access rules would be plainly contrary to the intent of Congress. It is well established that the Communications Act grants the Commission

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165 Chamber of Commerce of the United States v. F.E.C., 69 F.3d 600, 605 (D.C. Cir. 1995)(citing Bell Atlantic, 24 F.3d 1441).

broad authority to regulate the dynamic sphere of communications because Congress could not foresee all the developments in that arena.[166] Hence, a narrow reading of Commission jurisdiction would run counter to that grant of authority.

More specifically and recently, the Telecommunications Act of 1996 evidences a congressional goal of providing access to competitive sources of telecommunications services for *all* Americans (including those living and working in MTEs).[167] Indeed, the 1996 Telecommunications Act went so far as to require that customers could retain their telephone numbers when switching local exchange carriers so as to eliminate a barrier to the development of local competition.[168] It would be illogical to believe that Congress would preserve consumers' telephone numbers but would require them to move locations to enjoy local exchange competition.

Moreover, Congress clearly intended that *all* Americans could enjoy local competition, even if it meant providing third parties license to occupy the physical space of another.[169] By interfering with the ability of tenants in MTEs to have access to competitive sources of telecommunications services, a narrow construction of the Commission's authority to prevent

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166 See, e.g., F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940); see also National Broadcasting Co. v. U.S., 319 U.S. 190, 218-219 (1943).

167 S. Conf. Rep. No. 104-230, 113 (1996)(noting that the 1996 Telecommunications Act was intended "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

168 47 U.S.C. § 251(b)(2).

169 See, e.g., id. at §§ 251(c)(6) (physical collocation requirements) and 224(f)(1) (nondiscriminatory access for telecommunications carriers and cable operators to the poles, ducts, conduits, and rights-of-way owned or controlled by utilities).

nondiscriminatory MTE access rules would run contrary to the intent of Congress as expressed through the 1996 Telecommunications Act.

The 1996 Telecommunications Act -- both the physical collocation requirement and the obligations under Section 224 -- provide authority for the Commission not only to mandate physical connections, but also to license a third party to occupy the physical space of another. In *Bell Atlantic*, the D.C. Circuit held that Section 201(a), albeit a broad basis of authority, did "not supply a clear warrant to grant third parties license to exclusive physical occupation of a section of the LECs' central offices."[170] However, after the *Bell Atlantic* decision, Congress provided at least two very clear warrants to grant third parties license to exclusive physical occupation of another's property (indeed, not just the property of ILECs).

Section 251(c)(6), in direct response to the *Bell Atlantic* case, provides statutory authority for mandatory physical collocation in ILEC central offices.[171] Moreover, Section 224(f)(1) requires that utilities provide telecommunications carriers and cable operators with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned *or controlled* by the utility.[172] This is relevant not only because the access requirements of Section 224 extend to *all* utilities (not just ILECs), but also because they presumably can apply to the property of third parties not defined as utilities insofar as that property is merely controlled (albeit not owned) by a utility.[173]

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170 Bell Atlantic, 24 F.3d at 1446.

171 47 U.S.C. § 251(c)(6).

172 Id. at § 224(f)(1).

173 The importance of these nondiscriminatory access requirements is underscored by their inclusion in the competitive checklist of Section 271(c)(2)(B). 47 U.S.C. § 271(c)(2)(B)(iii).

These explicit statutory bases of authority were not available to the *Bell Atlantic* court. Their inclusion in the 1996 Telecommunications Act emphasizes the importance that Congress attached to the provision of local competition to *all* Americans and the authority of the Commission to require and oversee the occupation of an entity's property by third parties to accomplish congressional objectives.

For the foregoing reasons, it would appear highly inappropriate to apply the avoidance canon of the *Bell Atlantic* decision to the context of nondiscriminatory telecommunications carrier access to tenants in MTEs in light of the 1996 Act and recent judicial precedent.

Indeed, if read too strictly, the *Bell Atlantic* case threatens to swallow much of the Commission's jurisdiction. It is important that the case be recognized as the anomaly that it is.[174] The Tucker Act, upon which the court's analysis relies, was designed to protect agency decisions that would otherwise have amounted to unconstitutional takings by providing a mechanism for compensation. In short, it was meant to *assist* agencies and *promote* their policy objectives. The D.C. Circuit strangely twisted the Tucker Act to operate as a limitation -- rather than as an enabling device -- on agency action.

The Tucker Act represents Congress' opening of the fisc to allow compensation for Federal Government takings of private property and comes into play if the compensation otherwise ordered is insufficient for purposes of the Fifth Amendment. The *Bell Atlantic* court implies that permitting operation of the Tucker Act to compensate for the actions of the Commission would present a dilemma with respect to the separation of Federal Government

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[174] Not surprisingly, the relevant portion of that decision has never been followed by another court.

branches, by allowing the Commission to engage in actions that would result in a raid upon the fisc.[175] It is notable that Congress expressly contemplated application of the Tucker Act remedy to actions of more than one branch of the Federal Government, so the protection the D.C. Circuit sought to afford Congress had already been willingly discarded. Indeed, the Supreme Court found such a protective maneuver to be erroneous.[176] Moreover, to the extent that an agency's action results in the threat of a substantial drain on the Federal Government's resources, that agency's interpretation of the statute is reversible by precisely the same body that created the Tucker Act. Congress can reverse or otherwise restrict that agency's interpretation. Similarly, where a court has invalidated an agency's interpretation of a statute, as the *Bell Atlantic* court did, Congress can expressly supply the needed authority.

The Tucker Act should not be ascribed too much importance as it does not properly serve as a substantive limitation on federal agency power. "[T]he policies of the APA take precedence over the purposes of the Tucker Act. In the conflict between two statutes, established principles of statutory construction mandate a broad construction of the APA and a narrow interpretation of

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175 Bell Atlantic, 24 F.3d at 1445 ("Where administrative interpretation of a statute creates such a class [of identifiable cases in which application of a statute will necessarily constitute a taking], use of a narrowing construction prevents executive encroachment on Congress's exclusive powers to raise revenue and to appropriate funds.")(citations omitted).

176 See Riverside Bayview Homes, 474 U.S. at 127-128 ("the Court of Appeals erred in concluding that a narrow reading of the corps' regulatory jurisdiction over wetlands was 'necessary' to avoid 'a serious taking problem.' . . . [T]he possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the program"); see also Presault, 494 U.S. at 14-15 ("We have previously rejected the argument that a generalized desire to protect the public fisc is sufficient to withdraw relief under the Tucker Act.").

the Tucker Act."[177] It is merely a guarantee of forum for plaintiffs seeking monetary damages as a result of a past taking by the Federal Government. Indeed, the "exclusive jurisdiction" of the Claims Court is not exclusive at all. Title III courts can also provide for monetary relief.[178] That is, even were the Tucker Act not to exist, actions for takings against the Federal Government would remain available. The Fifth Amendment requires as much.

One cannot properly interpret the Tucker Act as a restriction on federal agency action. *Riverside Bayview Homes* contains an factual scenario analogous to the one presented by the *Bell Atlantic* decision. Pursuant to a broad statute, a federal agency adopted regulations that extended the reach of the statute to lands not specifically mentioned in the statute. The Army Corps of Engineers defined "navigable waters" (over which the Clean Water Act gave it jurisdiction) to include freshwater wetlands that were adjacent to other covered waters. The Supreme Court determined that the Corps' jurisdiction over "navigable waters" gave it statutory authority to regulate discharges of fill material onto adjacent wetlands.[179] The Supreme Court also criticized the Court of Appeals for concluding that a narrow reading of the agency's regulatory jurisdiction was necessary to avoid a serious taking problem. The Supreme Court explained that

> [b]ecause the Tucker Act, which presumptively supplies a means of obtaining compensation for any taking that may occur through the operation of a federal statute, is available to provide compensation for takings that may result from the Corps' exercise of jurisdiction over wetlands, the Court of Appeals' fears that application of the Corps' permit program might result in a taking did not justify the

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177 Bowen v. Massachusetts, 487 U.S. 879, 908 n.46 (1988)(quoting Delaware Div. of Health and Social Services v. Dept. of Health and Human Services, 665 F.Supp. 1104, 1117-1118 (Del. 1987)).

178 See id. at 910-911.

179 Riverside Bayview Homes, 474 U.S. at 134.

> court in adopting a more limited view of the Corps' authority than the relevant regulation might otherwise support.[180]

The foregoing analysis demonstrates that, under controlling Supreme Court decisions, the *Bell Atlantic* decision was erroneous and its analysis must not be given effect in light of Supreme Court decisions to the contrary.

Indeed, if construed too broadly, the *Bell Atlantic* case could stand for limits on the Commission's jurisdiction *whenever* a regulated entity presents a remotely credible takings claim. Takings arguments are raised frequently by parties subject to the Commission's regulations. Some arguments are more credible than others. But, the *Bell Atlantic* case should not be used to paralyze or otherwise instill trepidation in the Commission whenever the takings issue arises. That would be bad policy in the nondiscriminatory MTE access context, and it would also be bad policy on a more general level. The consequences for the Commission's ability or willingness to act could be severe. Instead, the *Bell Atlantic* case must be narrowly construed to the facts as they were presented in that case. There are several bases upon which to distinguish that case, and the Commission should pursue that course of action.

X. STATES MAY CONTINUE TO PLAY AN ESSENTIAL ROLE IN ENSURING NONDISCRIMINATORY TELECOMMUNICATIONS CARRIER ACCESS TO CONSUMERS IN MTES.

Teligent is an advocate of maintaining the appropriate States' role in the regulation of telecommunications. Indeed, the response to restrictions on access to MTEs began at the State level. Teligent believes that the States will continue to play a role in fashioning creative and constructive solutions to the problems that arise in the telecommunications arena. Hence, even

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[180] Id. at 128-129.

under a federal approach to the problem, the States could play a role in ensuring nondiscriminatory MTE access similar to their role over pole attachment rates, terms, and conditions.

That is, as suggested by the Notice,[181] the Commission could establish an informal reverse preemption mechanism whereby States with adequate nondiscriminatory MTE access rules could certify to the Commission that they regulate such access. After successful certification, the authority for enforcing such MTE access rules would reside with that particular State. The Commission could continue to regulate nondiscriminatory MTE access issues arising in those States that had failed to address the nondiscriminatory MTE access issue in an adequate manner. This tailored approach would ensure that consumers in all parts of the country will, in fact, have a choice of competitive facilities-based providers without unreasonably infringing on the authority of other regulating jurisdictions.

XI. THE COMMISSION SHOULD MODEL ENFORCEMENT PROCEDURES ON ITS POLE ATTACHMENT COMPLAINT MECHANISM.

The Notice seeks comment on mechanisms for enforcing any nondiscrimination obligations to which private property owners may be required to adhere.[182] The Commission could process access complaints through its accelerated pole attachment complaint procedures.[183] This would permit accelerated treatment of disputes, and would allow parties to address their concerns through paper filings (which should minimize time, travel, and cost burdens on MTE owners and telecommunications carriers alike).

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181 Notice at ¶ 62.

182 Id.

183 See 47 C.F.R. § 1.1400 *et seq.*

Practically considered, though, Teligent does not foresee substantial resort to the Commission's complaint procedures. It has been Teligent's experience that when MTE owners are made aware that a requirement for nondiscriminatory telecommunications carrier access exists, they agree to sit at the negotiating table (insofar as they do not have the ability for retribution in other States lacking access requirements). Carriers and MTE owners, in practice, have not exercised their full rights with each other in these circumstances, but rather negotiate mutually acceptable MTE access arrangements. Hence, Teligent expects that once the Commission establishes nationwide nondiscriminatory MTE access requirements, it will not be barraged with complaints.

XII. THE COMMISSION SHOULD RELOCATE THE DEMARCATION POINT IN ALL MTES TO THE MINIMUM POINT OF ENTRY.

The Notice requests comment on whether the Commission should modify or clarify its Part 68 demarcation point rules to promote telecommunications carrier access to MTEs.[184] To promote competitive telecommunications carrier access to consumers in MTEs, the Commission should require that the demarcation point in all MTEs be located at the MPOE.

Over 40 years of federal communications policy has sought to move the ILEC network control away from the end-user and closer to the switch. This process began with the D.C. Circuit's *Hush-A-Phone* decision.[185] The Hush-A-Phone product was a simple cup-like device that snapped onto a telephone handset and was designed to reduce noise and allow for greater conversational privacy. Through enforcement of its tariff, AT&T sought to prevent use of this

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184 Notice at ¶¶ 65-67.

185 Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956).

device as an attachment to the telephone not provided by AT&T. The Commission held in favor of AT&T, finding the Hush-A-Phone device deleterious to the telephone system, although not a physical impairment. The court set aside the Commission's decision. It concluded that AT&T's attempt to control a subscriber's use of telephone equipment in this manner operated as an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental."[186] This decision represents the beginning of a reduction in monopolist control over the end-to-end telephone network. Like policies continued with, inter alia, the Commission's *Carterfone* decision[187] and its deregulation of inside wire.[188]

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186 Id. at 269.

187 Use of the Carterfone Device in Message Toll Telephone Service, Docket Nos. 16942 and 17073, *Decision*, 13 FCC 2d 420 (1968). The Carterfone device manually permitted mobile radio system users to converse with individuals on the wired telephone network through the use of a base station cradle. The Bell Companies advised their subscribers that the Carterfone was a prohibited interconnecting device, the use of which would subject the user to penalties. The FCC held that the device did not adversely affect the telephone system and, relying on Hush-A-Phone, found it to be an unwarranted interference with the telephone user's rights. Moreover, it stated that "[n]o one entity need provide all interconnection equipment for our telephone system any more than a single source is needed to supply the parts for a space probe." Id. at 424. In a modest but significant manner, the FCC loosened the Bell Companies' end-to-end monopoly control over the telephone network.

188 Modifications to the Uniform System of Accounts for Class A and Class B Telephone Companies Required by Detariffing of Customer Premises Equipment and Proposed Detariffing of Customer Provided Cable/Wiring, CC Docket No. 82-261, *Report and Order*, 48 Fed. Reg. 50534 (1983)(detariffing the installation of complex inside wire); Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, *Memorandum Opinion and Order*, 1 FCC Rcd 1190 (1986)("Detariffing MO&O")(detariffing to installation of simple inside wiring and maintenance of all inside wiring).

Continuing to permit location of the demarcation point at the customer premises (or some location other than the MPOE) threatens to reverse that policy. Where the demarcation point is not located at the MPOE, rather than terminating its network control at a building's entrance facilities, an ILEC is able to extend its exclusive control of telephone network facilities well into a building to the individual customer premises. In this manner, the ILEC largely controls the ability of consumers in MTEs to obtain service from a competing carrier.

Retention of an ILEC's ability to locate the demarcation point at the customer premises would represent a radical departure from the course of four decades of communications policy and regulation, and would begin to reverse the consumer benefits that have been gained through those policies. Teligent strongly urges the Commission to continue its pro-competitive policies by establishing the demarcation point in *all* commercial and residential MTEs at the MPOE. In this manner, ILEC control over the in-building network cannot be employed to impair competition and extract the related benefits from consumers.

The cost and complexity of rewiring existing buildings -- some stretching many stories high -- can add many thousands of dollars to the cost of serving just one customer in a building. Unlike an ILEC that performs such installations during building construction for every floor and traditionally has been given free access to such wiring thereafter, competitors must often deal with myriad hurdles, both in time and money, in drilling through floors and cabling elevator shafts during and after business hours. Just like that portion of a loop connecting an ILEC switch to a building, existing risers give incumbents a decided advantage in cost and time-to-service.

Ironically, where the demarcation point is not located at the MPOE, carriers relying on resale or unbundled loops -- who, through such reliance, are limited in the innovative services and lower rates they can offer customers -- are able to avoid the costs of rewiring buildings, while

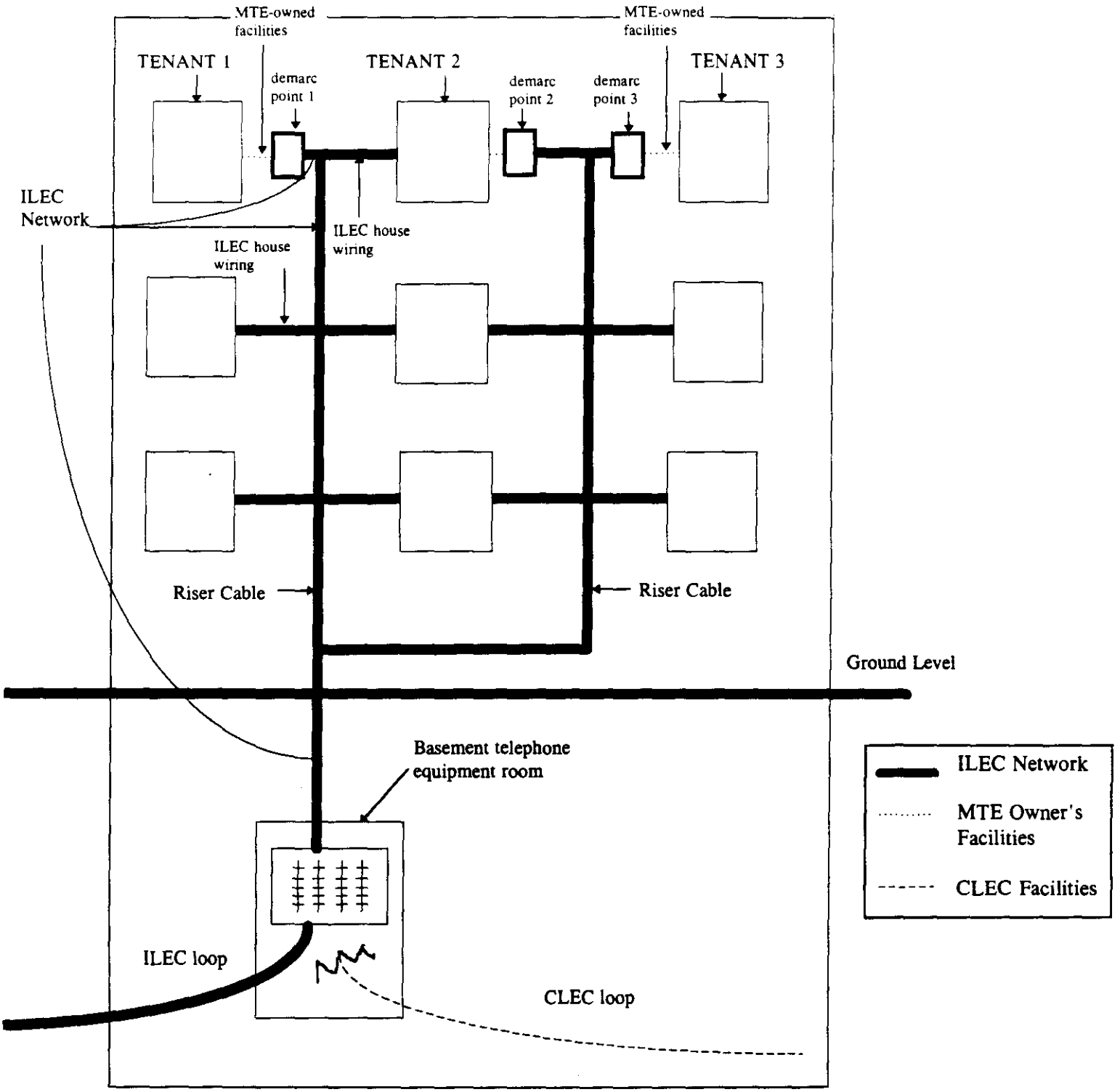
facilities-based carriers like Teligent -- who are able to offer customers newer and more innovative services at lower rates -- must incur these costs. By permitting the ILEC to establish the demarcation point at the customer premises, the existing demarcation practices strongly discourage facilities-based competition, which offers the greatest benefit to consumers, in favor of the more limited benefits of resale and unbundled loop-based competition. Given the presence of competitors who are now able to bring facilities all the way to a customer's building, and the concomitant benefits that go along with that ability, the logical regulatory action is to eliminate disincentives for these fully facilities-based competitors.

One way to eliminate some of these disincentives is to designate the MPOE as the inside wire demarcation point for all MTEs. Assuming MTE owners and managers are precluded from discriminating against competitors, if the demarcation point is moved to the MPOE, all competitors will have equal access to building risers. The severe disparity in costs and access between incumbents and new entrants would be greatly reduced. This designation would also forward the goals underlying the Commission's efforts to deregulate inside wiring and create competitive pressures similar to those now operating on customer premises equipment.

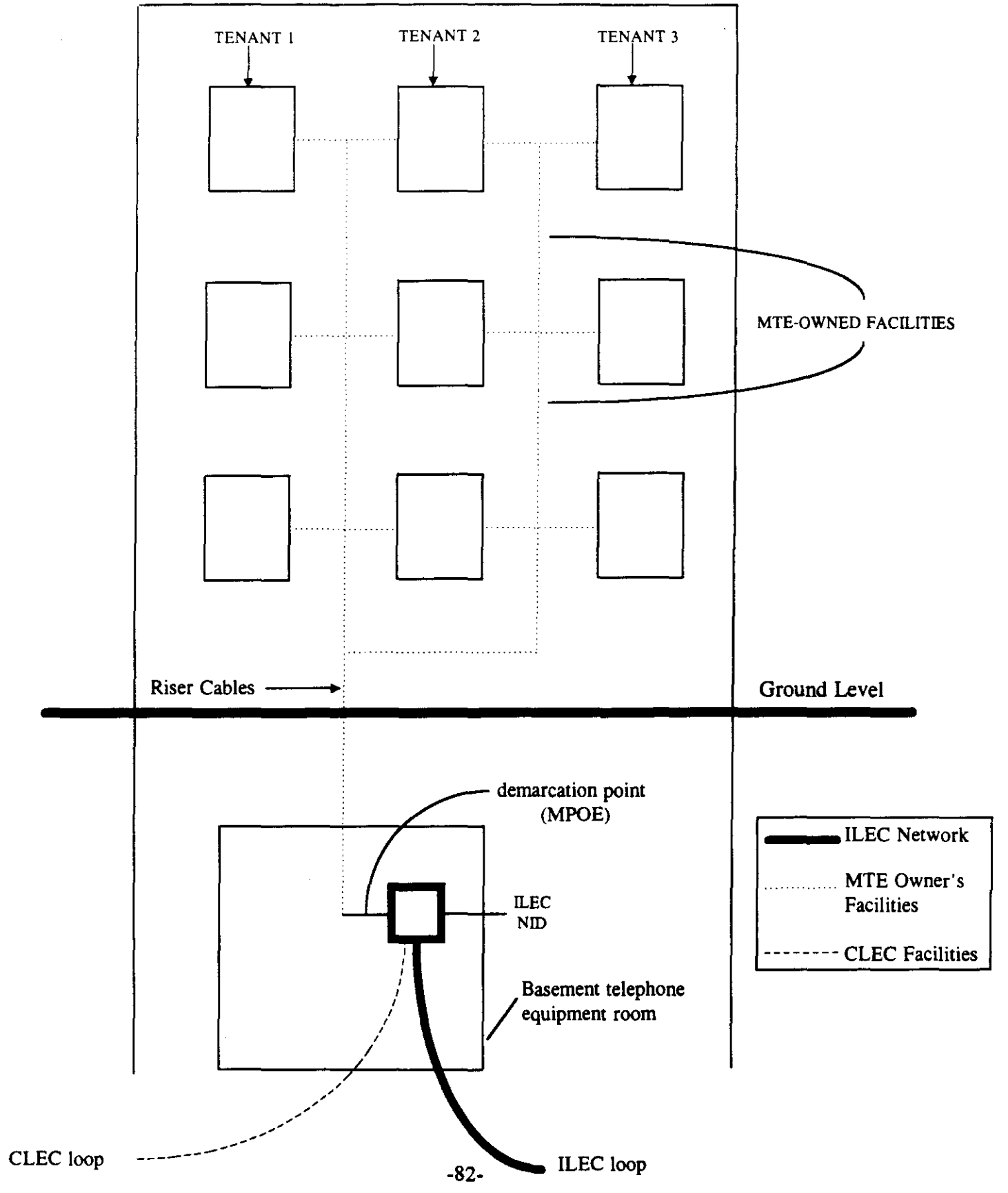
As illustrated by the charts on the following pages, where the demarcation point is <u>not</u> located at an MTE's MPOE, the ILEC's network control extends inside the building. Absent rewiring that portion of the MTE, a carrier must negotiate with the ILEC for access to that portion of the intra-MTE wiring. The enormous complexity of obtaining access to the MTE that arises out of negotiations with the MTE owner is compounded considerably by the necessity of negotiating with yet another party -- the CLEC's main competitor -- for access to another portion

of the facilities within the MTE. By contrast, where the demarcation point is located at the MPOE, the ILEC and competitive carriers enter the MTE on an equal basis.

MTE IN WHICH THE DEMARCATION POINT IS NOT LOCATED AT THE MPOE



MTE IN WHICH THE DEMARCATION POINT IS LOCATED AT THE MPOE



The network interface device is often located at the demarcation point(s) within an MTE. The Commission observed that

> [w]hen a competitor deploys its own loops, the competitor must be able to connect its loops to customers' inside wiring in order to provide competing service, especially in multi-tenant buildings. In many cases, inside wiring is connected to the incumbent LEC's loop plant at the NID. In order to provide service, a competitor must have access to this facility.[189]

However, when the NID/demarcation point is located at individual customer premises or on each floor of a multi-story building or at each individual office or residence within a building, access to that NID requires duplicating the ILEC's in-building network -- an option that some MTE owners understandably prefer to avoid when a less invasive option is readily available.

The technical and practical feasibility of relocating the demarcation point is not in question. States such as California, Minnesota, and Nebraska have designated the MPOE as the inside wire demarcation point,[190] and, with building owner permission, competitors access risers to offer customers a variety of competing services. Rather than either rewiring a building or having to depend on the competing incumbent for access to existing risers, in these circumstances,

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189 *Local Competition Order* at ¶ 392.

190 See Pacific Bell, Applications 85-01-0034, 87-01-002, *Decision 92-01-023*, 43 CPUC 2d 115 (Cal. PUC, rel. Jan. 10, 1992); In the Matter of the Deregulation of the Installation and Maintenance of Inside Wiring based on the Second Report and Order in FCC Docket 79-105 Released February 24, 1986, Docket Nos. P-999/CI-86-747 and P-421/C-86-743, *Order*, 1986 Minn. PUC LEXIS at *9-10 (Minn. PUC, Dec. 31, 1986); In the Matter of the Commission, on its own motion, to determine appropriate policy regarding access to residents of multiple dwelling units (MDUs) in Nebraska by competitive local exchange telecommunications providers, Application No. C-1878/PI-23, *Order Establishing Statewide Policy for MDU Access*, slip op. at 4 (Neb. PSC, entered March 2, 1999).

competitors are placed on equal footing so long as building owners do not discriminate among them.[191]

[191] It is also imperative that CLECs be given access to the wiring blocks at the MTE's MPOE without the necessity of ILEC personnel being present (unless there are no cross-connect facilities at the MPOE). Such unescorted access already occurs in States where the demarcation point is at the MPOE, and any concerns over competitor access to the ILEC's network components could be addressed contractually through the imposition of industry-accepted technical standards or certification.

XIII. CONCLUSION

For the foregoing reasons, Teligent strongly urges the Commission to adopt rules that permit consumers in MTEs to receive telecommunications services from their facilities-based carrier(s) of choice on a nondiscriminatory basis. The Commission has at its disposal various tools to ensure nondiscriminatory telecommunications carrier access to consumers in MTEs, and it should move expeditiously to accomplish this end.

Respectfully submitted,

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Dated: August 27, 1999

CERTIFICATE OF SERVICE

I, Rosalyn Bethke, do hereby certify that on this 27th day of August 1999, copies of the foregoing Comments of Teligent, Inc. filed today with the FCC in WT Docket No. 99-217/CC Dkt No. 96-98 were served by hand delivery on the following parties:

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